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No. 92-740

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

C.F. BEAN CORPORATION,

Petitioner,

vs.

MID-VALLEY, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the trial court erred in holding that a master bareboat charter which contained cross-insurance clauses was enforceable.

2. Whether the trial court erred in holding that respondent was entitled to prevail on its cross claim based on petitioner's breach of contract.

PARTIES

1. The Petitioner is C.F. Bean Corporation, the stock of which is privately held.

2. The Respondent is Mid-Valley, Inc., a wholly owned subsidiary of Brown & Root, Inc. Brown & Root, Inc. is a subsidiary of Halliburton Co., a publicly traded corporation.

3. Paul Dombrowski, an individual, was the plaintiff in the original action but is not a party to this petition.

4. Ocean Marine Indemnity Company, a wholly owned subsidiary of Gulf Coast Marine, Inc., was a party in the District Court, but does not join in the Petition. The stock of Gulf Coast Marine, Inc. is privately held.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On November 6, 1987 Petitioner (hereinafter "Bean") and Respondent (hereinafter "Mid-Valley") entered into a master bareboat charter for the dredge Bubba J. Bean II. The charter (hereinafter the "Charter") resulted from extensive arms-length bargaining between representatives of Bean and Mid-Valley. The charter hire rate was $800 per day payable to Bean. While MidValley felt that $800 per day was too high, they agreed to that rate in consideration for Bean's agreement to provide hull and

machinery as well as protection and indemnity insurance for injuries to non-crewmembers. In turn, Mid-Valley was to provide workers compensation and employers liability insurance for their crew.

In fulfilling its obligations under the Charter, Mid-Valley purchased workers compensation and employers liability insurance from Highlands Insurance Company. This policy covered injuries to crewmembers. Bean provided hull and machinery insurance as well as protection and indemnity insurance covering injuries to noncrewmembers under a policy issued by Ocean Marine Insurance Company. The trial court found, and there was no dispute on appeal, that Paul Dombrowski, the plaintiff in the underlying action, was not a member of Mid-Valley's crew. Accordingly, the protection and indemnity policy purchased by Bean covered the injuries suffered by Paul Dombrowski. Conversely, it is now undisputed that the Mid-Valley workers compensation and employers liability insurance policy did not apply to the injuries suffered by Paul Dombrowski.

Paul Dombrowski was injured on the Bubba J. Bean II when an anchor toppled over on him, crushing him to the deck. Dombrowski sued Bean and Mid-Valley. The defendants crossclaimed against each other because of the mutual obligations to obtain insurance under the Charter. Bean and its underwriters refused to provide coverage and a defense to Mid-Valley in breach of the Charter.

Because of Bean's breach of contract Mid-Valley was exposed to a potentially enormous verdict if the plaintiff, Paul Dombrowski's case went to trial. Mid-Valley further had the duty to mitigate the damages occasioned by Bean's breach of contract. Mid-Valley satisfied that legal obligation by entering into a fair and reasonable settlement with the plaintiff on February 20, 1991,

thereby capping the potential exposure.[1] Plaintiff ageed to a non-suit as to Bean.

At that point, the only remaining dispute concerned the rights and obligations under the Charter as between Bean and Mid-Valley. Those rights and obligations did not and could not cease by virtue of the responsible position taken by Mid-Valley in settling the claim of Dombrowski and thereby mitigating the damages caused by Bean's continued breach of their obligations under the charter party.

Trial on the crossclaims proceeded on April 1-2, 1991. Following the conclusion of the trial, the court held in favor of Mid-Valley and against Bean on Mid-Valley's crossclaim, for the amount of the settlement with the plaintiff including interest and attorney's fees. A final Order and Judgment, dated November 4, 1991 was entered on the docket of the court on November 6, 1991 in favor of Mid-Valley in the amount of $900,000 plus attorney's fees of $70,000, plus post-judgment interest thereon.

An appeal of the District Court's final Order and Judgment was taken to the United States Court of Appeals for the Third Circuit. Extensive briefing ensued in the Third Circuit which included Bean's brief, Mid-Valley's brief, as well as a reply brief filed by Bean. On July 28, 1992 the United States Court of Appeals for the Third Circuit affirmed the judgment of the District Court in

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1. Bean's repeated assertions that Highlands settled the case with Dombrowski are ludicrous. Dombrowski sued Mid-Valley. Dombrowski settled with Mid-Valley. That Highlands, a sister corporation of Mid-Valley, may have financed the settlement is completely irrelevant. All that matters in the dispute before this Court is the fact that the Highlands policy, obtained by Mid-Valley in satisfaction of their obligations under the charter party, and which named Bean as an additional insured, covered only injuries to crewmembers. Paul Dombrowski was not a crewmember.

a *per curiam* judgment order. The Petition for a Writ of Certiorari followed.

SUMMARY OF ARGUMENT

Mutual clauses in a master bareboat charter negotiated at arms length, in good faith and without coercion or any elements of monopolistic compulsion or overreaching, requiring that each party to the agreement take out insurance coverage for specifically enumerated risks, naming the other party as a named insured and waiving subrogation rights against the other party are valid and enforceable as between the parties. The circuit courts are now in unanimous agreement that requirements to procure insurance are not invalidated either by *Bisso*[2] or as otherwise contrary to public policy.

Petitioner has misstated the law, has mischaracterized this action as one for subrogation, and in the process has incorrectly argued that Highlands Insurance Company, which has never been a party to this case, is in fact the real party in interest. The policy issued by Highlands, which named Bean as an additional insured, did not provide coverage for non-crew members such as Dombrowski. Mid-Valley was never contractually responsible for obtaining coverage for injuries to non-crew members such as Dombrowski. Accordingly, the trial court properly characterized this matter as a breach of contract action between Bean and MidValley and correctly ruled in Mid-Valley's favor.

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2. *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955).

REASONS FOR DENYING THE WRIT

I.

Mutual clauses in a master bareboat charter negotiated at arms length, in good faith and without coercion or any elements of monopolistic compulsions or overreaching, requiring that each party to the agreement take out insurance coverage for certain enumerated risks, naming the other party as an additional insured and waiving subrogation against the other party are valid and enforceable and do not contravene any decisions of this Court.

On November 6, 1987 Mid-Valley and Bean, two parties of equal bargaining power sat across a table and negotiated a master bareboat charter. By the terms of this agreement Mid-Valley was to have the use of a dredge barge owned by Bean, for a specified period of time. It was to be used in fulfilling a contract MidValley had to lay a pipeline across Newark Harbor. The pipeline was to be buried beneath the harbor floor.

Now, Bean suggests an expansive, yet unfounded reading of the "*Bisso*"[3] line of cases in order to have this Court find the charter void as against public policy. However, the *Bisso* line of cases simply has no application to the master bareboat charter before this Court.

All the appellate courts as well as the commentators who have interpreted the *Bisso* line of cases agree that *Bisso* now stands only for the proposition that in a *contract of towage*, a provision that directly and entirely exculpates the tug from any and all liability

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3. *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955); *Boston Metals Co. v. The WINDING GULF*, 349 U.S. 122 (1955); *Dixilyn Drilling Co. v. Crescent Towing & Salvage Co.*, 372 U.S. 697 (1963).

whatsoever will be held to be invalid, and then only in circumstances where there is clear evidence before the court of a markedly unequal bargaining position between the tug and the tow.[4] *See generally:* Dixon and Canning, *The Continuing Erosion of Bisso–Waiver of Subrogation and Benefit of Insurance Clauses,* 44 Ins. Counsel J. 97 (1977); *see also: Hercules, Inc. v. The Stevens Shipping Co., Inc.,* 698 F.2d 726 (5th Cir. 1983) ("It bears repeating that, if the contract is one for transportation, we have no difficulty finding *Bisso* inapplicable.l').[5]

The clause in the instant matter is not exculpatory nor did it insulate Mid-Valley from the effects of its negligence, either directly or indirectly. In theory and in fact Mid-Valley was responsible for its negligence. The mutual insuring clauses contained in the master bareboat charter designated as between the parties which insurer was to bear what loss *inter se,* and had no effect upon the liability of Mid-Valley for damages resulting from its negligence, either to third parties or to the dredge. The clause shifted liability for paying certain types of losses to a particular insurer but did not shift or purport to shift the ultimate responsibility for negligence.

Mid-Valley, in the first instance, remained liable to anyone injured on the vessel whether they were crew members or not. For

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4. In effect, all the parties in this case agreed to do was to allocate the costs of insurance, a practice recognized and endorsed by courts and commentators directly addressing the issue.

5. *See also:* Schoenbaum, T. *Admiralty and Maritime Law,* 1987 ("Two major exceptions exist to the admiralty rule allowing indemnity. First, contracts releasing towers from liability from negligent towing of a barge are against public policy. (Citing *Bisso*). This is a narrow exception, limited to towage contracts; the effect of the rule is largely obviated by provisions in towing contracts naming the tower as an additional insured; *id.* at page 152).

example, Mid-Valley remained responsible for losses exceeding the required insurance (the agreed value of the vessel). Finally, if for instance Bean went out of existence and it had never purchased insurance as it was required to do under the charter, Mid-Valley also remained liable in the first instance to anyone injured aboard the vessel as a result of its negligence.[6] Accordingly, the *Bisso* line of cases which invalidated agreements which completely exculpated a tug from its own negligence simply have no bearing on this case.

A review of the this Court's views on freedom of contract, the historical background of the "Bisso Rule", and subsequent appellate decisions which have correctly limited and distinguished *Bisso* lead to the inevitable conclusion that the trial court and the Third Circuit were correct in enforcing the contract between Mid-Valley and Bean. Bean now asks this Court to become the first appellate court to apply *Bisso* to invalidate a master bareboat charter containing cross insurance clauses entered into between parties of equal bargaining power. Such an invitation, which essentially flies in the face of the public policy upholding freedom of contract between commercial entities should be declined by this Court.

Consistent with general contract law, parties to a maritime transaction enjoy freedom of contract. Thus, in the absence of an

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6. Bean raises in footnote #3 of its Petition facts which were not before either the District Court or the Third Circuit Court of Appeals. Whether one of Bean's excess insurance carriers is insolvent or not is simply irrelevant to a determination of the issues before this Court. In taking its appeal to the Third Circuit Bean filed a supersedeas bond which will ensure payment of the judgment. Furthermore, the fact of the insolvency of the insurance carrier reinforces Mid-Valley's arguments that the cross insurance clauses were not exculpatory nor did they insulate Mid-Valley from the effects of its own negligence either directly or indirectly.

unconscionable disparity in bargaining positions, contracting parties in the maritime area are free to distribute liabilities and costs as they wish. *Fluor Western, Inc. v. G. & H. Offshore Towing Co.*, 447 F.2d 35 (5th Cir. 1971).[7]

As early as 1937, This Court had the opportunity to construe the effect of a benefit of insurance and waiver of subrogation clause in a contract of common carriage. In *Great Lakes Transit Corp. v. Interstate S.S. Co.*, 301 U.S. 646 (1937) This Court denied an insurer the right to proceed by way of subrogation against a carrier which had procured cargo insurance for the benefit of itself and the cargo owner but had charged the cargo owner a carriage price which reflected the cost of the premium for such insurance. The insurer had argued that since the cargo owner was the ultimate procurer of the insurance, (having paid an increased rate equal to the cost of the insurance) the insurer could proceed under its subrogated rights against the negligent carrier as a third party. This Court disagreed and enforced the cargo insurance in favor of the carrier despite the fact that the cargo was damaged as a result of the carrier~s negligence and even though the underwriter had no subrogation rights. Similarly, in *Lukenbach v. W.J. McCahan Sugar Ref. Co.*, 248 U.S. 139 (1918) this Court refused to grant an

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7. *See also*, Schill, G., *Recent Developments Regarding Maritime Contribution and Indemnity*, 51 La. L. Rev. 975 (1991) ("With the exception of the maritime contractor who is protected by the Longshore Act and the tug/tow situations illustrated in *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 75 S. Ct. 629 (1955) maritime principles permit the parties to enter into an agreement whereby the indemnitor holds the indemnitee harmless for the latter's negligence."); Rodriguez-Atketz, J. *Apportionment of Risk in Vessel and Marine Terminal Contracts*, 64 Tulane Review 497 (1989) (The prohibition against exculpation in towage agreements was the product of a desire to protect the community from overreaching and "monopolistic compulsions" (citations omitted). The prohibition is consistent with the freedoms permitted of parties to private contracts of affreightment, absent factors suggesting an unconscionable bargain resulting from a disparity in bargaining positions. *Id.* at page 502.)

insurer a recovery against a negligent carrier where the cargo insurance had been purchased by the shipper, named the carrier as an additional assured and waived subrogation rights against the carrier.

Bean's argument would effectively render the whole concept of an additional insured void as against public policy. Bean's argument taken to its logical conclusion is that any time two commercial entities agree to provide insurance for certain risks and add the other party to the contract as an additional insured, negligence on the part of the additional insured is being encouraged since damages are paid by the insurance. Every liability insurance policy insulates the insured and the additional insured from the cost of negligence, at least to the extent of the amount of the insurance. Bean's position would invalidate such policies. Courts attuned to commercial realities have not seen fit to take that step, recognizing that allocation of insurance costs is a normal part of doing business. *See e.g., Transport Indem. Co. v. Home Indemnity Co.*, 535 F.2d 232 (3d Cir. 1976) (lessor of trucks provided insurance for fire, theft, comprehensive and collision insurance; the lessee covenanted to provide insurance for injuries to third parties). In a nutshell, the issue of which party to a contract is to buy insurance for a particular risk is not the 'evil" sought to be remedied by the *Bisso* trilogy. In fact, a careful review of the *Bisso* holding demonstrates that *Bisso* has no application in the conflict before this Court involving a master bareboat charter.

The issue to which this Court addressed itself in *Bisso* was whether a tug may validly contract away all liability for its own negligent towage. This Court reviewed its earlier finding in *The Steamer Syracuse*, 12 Wall 167 (1871) which was decided "in an era of manifest judicial hostility toward release-from-negligence contracts, *particularly those made by businesses dealing widely with the public and having potential monopolistic powers." Bisso,* at 349 U.S. 89. (emphasis added). The *Bisso* Court cited situations

involving common carriers, and telegraph company contracts as other examples of situations calling for judicial intervention. A divided Supreme Court (5-3) held that a release from liability clause in a contract of towage was invalid as against public policy. The majority opinion emphasized two basic objectives for the application of this doctrine to the towage industry: first, to discourage negligence by making wrongdoers pay damages; and second, to protect those in need of goods or services from being overreached by towers who have the power to drive hard bargains. *Bisso* at 349 U.S. 90-91. While the majority opinion did not cite any statistical data in support of the determination that monopolistic conditions existed in the towage industry, the Court reasoned that because of increased maritime traffic it was not less but more important that vessels in American ports be able to obtain towage free of monopolistic compulsions. *Bisso* at 349 U.S. 91.

The *Bisso* Court emphasized that the rule was merely a particular application to the towage business of a general rule long used by courts and legislatures to prevent enforcement of release-from-negligence contracts in many relationships involving unequal bargaining power such as bailors and bailees, employers and employees, public service companies and their customers. The *Bisso* opinion when discussing the bailor/bailee relationship referred to cases collected in 175 A.L.R. 110-141. *Bisso* at 349 U.S. 91, footnote #14. In that article the commentator distinguished an ordinary bailee's right to make a contract exempting him from liability from those contracts of bailment for hire entered into by the bailee in a course of a general dealing with the public (so-called "professional bailees").

The Court in *Bisso* also referred to another section of the same A.L.R. article dealing with public service corporations. There, it was noted that in the case of contracts between public service corporations and their customers the difference in the relative bargaining power is so pronounced as to make any attempt on the

part of the corporations to exempt themselves from liability for their own negligence particularly obnoxious. One should therefore expect the courts unanimously to hold such clauses invalid as against public policy.

Contrary to Bean's assertion in its Petition that the *Bisso* Court was aware that the case really involved parties bargaining at arms length, such an argument clearly ignores the second public policy consideration enunciated by the Court that those in need of goods or services had to be protected from being overreached by those who had the power to drive a hard bargain. This is further reflected in this Court's reasoning in *Southwestern Sugar and Molasses Co. v. River Terminal Corp.*, 350 U.S. 411, 79 S. Ct. 1210 (1958) where it was held that the rule of *Bisso*, however applicable where the tow boat owner has the power to drive hard bargains, may well call for modification when the power is effectively controlled by a pervasive regulatory scheme. 360 U.S. at 418. Similarly, in the absence of monopolistic compulsions the forces of the market place effectively control the ability of parties to allocate costs as they deem appropriate, including the costs of insurance for particularly enumerated risks. Insurance is a fact of life in modern business, and insurance arrangements such as the one at issue herein are to be found in many types of commercial agreements.[8]

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8. *See Ogea v. Loffland Bros. Co.*, 622 F.2d 186 (5th Cir. 1980) (contract between drilling platform owner and operator which required the operator to procure insurance naming the owner as a co-insured with waiver of subrogation); *Aetna Casualty and Surety Co. v. L.K. Comstock & Co.*, 488 F. Supp. 732 (D. Nev. 1980) (agreement between owner and prime contractor for construction of oil storage tank, wherein contractor was obligated to procure insurance with owner as named insured); *Price v. Zim Israel Navigation Co., Ltd.*, 616 F.2d 422 (9th Cir. 1980) (contract between stevedoring contractor and steamship company providing that steamship company would be named a co-insured under stevedore's liability insurance policies).

The unstated premise which underlies Bean's arguments is that the *Bisso* rule forbidding exculpatory arrangements is one of general application in the maritime field, rather than in the very narrow area of towage contracts. As the foregoing has made clear, this is simply not the case. Thus, despite Bean's assertion to the contrary, the Third Circuit in affirming the ruling of the District Court here, did not depart from its application of the law in *PPG Industries v. Ashland Oil Company Thomas Petroleum*, 592 F.2d 138 (3rd Cir. 1978), *cert. denied*, 444 U.S. 830 (1979). In *PPG*, the opinion precisely characterizes the rule in *Bisso* and *Dixilyn Drilling* as "bar[ring] contract provisions that shift responsibility for tower's negligence." 592 F.2d at 145.

There would indeed have been a conflict between the Circuits if the Third Circuit in the instant matter had followed its *dicta*[9] in *PPG Industries, Inc. v. Ashland Oil Company Thomas Petroleum*, 592 F.2d 138 (3rd Cir. 1978), *cert. denied*, 444 U.S. 830 (1979). Instead, the Third Circuit decided to follow the holdings of every other Circuit which has considered the issue that cross insurance clauses are not invalidated either by *Bisso* or as contrary to public policy.[10]

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9. Mere *dictum* in a decision of one Court of Appeals which is in conflict with the decision of another Court of Appeals is an insufficient reason to grant a petition for certiorari. *Keller v. Adams-Campbell Co.*, 264 U.S. 314 (1924).

10. Bean has also misstated the basis for the Court's holding in *Dixilyn v. Drilling Co. v. Crescent Towing & Salvage Co.*, 372 U.S. 697 (1963). Contrary to Bean's assertions, the Fifth Circuit never addressed the insurance issue as part of their reasoning. In fact it would have been of no import even if the Fifth Circuit had because the contract in *Dixilyn* required the barge owner to *completely* indemnify the tower against the tower's own negligence. Rather the Fifth Circuit addressed the first concern of *Bisso, supra* (to discourage negligence by making wrongdoers pay damages) and said it was inapplicable because of the peculiar hazards involved in towing the barge in question. This Court in reversing the Fifth Circuit never even addressed the issue of insurance and simply held that the Fifth Circuit was in conflict with *Bisso* and *Winding Gulf* with no further explanation.

Contrary to Bean's arguments, all circuits which have passed upon benefit of insurance clauses have held they are not invalidated either by *Bisso* or as contrary to public policy.[11] Indeed, Bean's argument that the Seventh Circuit now stands alone in its declaration that the impact of the *Bisso* rule cannot be circumvented, citing *Dow Chemical Co. v. M/V Charles F. Deitmayor, Jr.*, 545 F.2d 1091, 1094 (7th Cir. 1976) constitutes a misstatement of the holding in *Dow Chemical.*

In *Dow Chemical, supra,* Dow, as owner of a barge, contracted with a tugboat operator to move the barge. While under tow, the barge collided with a bridge. The towage contract contained intricate and involved language designed to exculpate the tower. The tower asserted that certain provisions of the contract constituted a specific undertaking on the part of the barge owner to indemnify and hold harmless the tower for any damage to the towed barge which might result from the tower's negligence. Another section of the contract discussed insurance, but the barge owner did not carry insurance and, the court noted, there was no duty imposed upon the barge owner to carry insurance for the benefit of the tugboat.

The court in *Dow Chemical* specifically distinguished the situation before the court in *Twenty Grand Offshore, Inc. v. West*

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11. *Hooks v. Southeast Construction Corp.*, 538 F.2d 431 (D.C. Cir. 1976); *Kerr-McGee Corporation v. Law*, 479 F.2d 61 (4th Cir. 1973); *Crawford v. West India Carrier, Inc.*, 337 F. Supp. 262 (S.D. Fla. 1971), *reversed*, 492 F.2d 679 (5th Cir. 1974), *cert. denied*, 419 U.S. 836 (1974); *Twenty-Grand Offshore v. West India Carriers, Inc.*, 492 F.2d 679 (5th Cir. 1974), *cert. denied*,, 419 U.S. 836 (1974); *Voisin v. O.D.E. C.O. Drilling Co.*, 744 F.2d 1174 (5th Cir. 1984); *Fluor Western, Inc. v. G&H Offshore Towing Co.*, 447 F.2d 35 (5th Cir. 1971), *cert. denied*, 405 U.S. 922 (1972); *Basf Wyandotte Corp. v. Tug Leander*, 590 F.2d 96 (5th Cir. 1979); *Canarctic Shipping Co. v. Great Lakes Towing Co.*, 670 F.2d 61 (6th Cir. 1982); *Calcasieu Chemical Corp. v. Canal Barge Co.*, 404 F.2d 1227 (7th Cir. 1969); *Dillingham Tug & Barge Corp. v. Collier Carbon & Chemical Corp.*, 707 F.2d 1086 (9th Cir. 1983), *cert denied*, 465 U.S. 1025 (1984).

India Carriers, Inc., 492 F.2d 679 (5th Cir. 1974), *cert. denied*, 419 U.S. 836, 95 S. Ct. 63, 42 L. Ed.2d 62 which required each party to fully insure its vessel, to effect a waiver of subrogation and to name the other party as an additional insurer. Furthermore, the court specifically distinguished between a contract of towage involving complete exculpation and other situations involving third parties or of contracts of affreightment citing to its own opinion in *Calcasieu Chemical Corp. v. Canal Barge Co.*, 404 F.2d 1227 (7th Cir. 1969) which upheld insurance provisions similar to those before the court in *Twenty Grand, supra, Fluor Western, supra* and all of the other Circuits which have directly addressed the issue. The Seventh Circuit also noted that to hold the barge owner responsible would have been manifestly unfair since the barge owner might itself have insured against the loss, even though occasioned by its own negligence.

Bean argues that maritime law should be uniform. With this notion respondent wholeheartedly agrees. Every Circuit Court which has now considered the issue before This Court now agrees that cross insurance clauses are enforceable, absent overreaching, and do not violate any public policy. The *dicta* from *PPG* now having been erased, there is no longer any uncertainty over whether such clauses are valid and enforceable. In light of the unanimity of opinion among the circuits there is no important reason for this Court to grant Bean's Petition for Certiorari.

II.

The workers compensation and employers liability policy obtained by Mid-Valley in satisfaction of its obligations under the master bareboat charter which named Bean as an additional insured did not provide coverage for non-crew members such as the plaintiff, Paul Dombrowski. Accordingly, the trial court properly characterized this action as one for breach of contract for which Mid-Valley was entitled to recover against Bean.

Bean has seriously misstated the law in an effort to convert this matter from a breach of contract action to one involving subrogation.[12] The claim, boiled down to its essence, is that of Mid-Valley against Bean to enforce the charter obligations mutually agreed upon by the parties. The right to enforce the charter belongs and has always belonged solely to Mid-Valley. Bean's attempted recharacterization of the action cannot alter the respective rights and obligations accruing to Bean and Mid-Valley under the terms of the charter party. These cannot be nullified by virtue of the responsible position taken by Mid-Valley in settling the claim of Dombrowski and in the process mitigating the damages caused by Bean's continued breach of its obligations under the charter. Bean's latest position is tantamount to arguing that MidValley had no rights to enforce the mutual obligations contained in the charter party solely because of its settlement of the Dombrowski claim.

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12. Interestingly, the closest any party came to violating the "waiver of subrogation" clauses in the charter occurred when Ocean Marine sued Mid-Valley in the related action. (Civil Action No. 90-2220). Because Bean was to provide P&I Insurance for injuries such as those suffered by Dombrowski, Ocean Marine's policy should have come into play. If Ocean Marine had stepped in and paid Dombrowski's claim (Bean's breach of contract prevented this from occurring) then Ocean Marine never should have filed suit against its own additional assured, Mid-Valley, for this particular risk. *Dow Chemical Company v. M/V ROBERTA TABOR, and M/V SUGARLAND,* 815 F.2d 1037 (5th Cir. 1987).

Bean has cited *Marathon Oil Co. v. Mid-Continent Underwriters*, 786 F.2d 1301 (5th Cir. 1986) for the proposition that where an underwriter settles a claim on behalf of one insured under a policy, it cannot seek subrogation from another insured, even if the claim was not covered under the policy. Not only has Bean mischaracterized the holding in *Marathon, supra*, but it has completely failed to bring to this Court's attention the subsequent Fifth Circuit decision in *Dow Chemical Company v. M/V ROBERTA TABOR, and M/V SUGARLAND*, 815 F.2d 1037 (5th Cir. 1987) which discusses the *Marathon* opinion and which is directly on point with respect to the issues in this case.[13]

In *Marathon*, the insurance at issue did not protect Marathon, an additional insured under the policy,with respect to liability arising out the activity in which it was engaged — the operation of offshore platforms — but did insure against the type of risk that occurred (injury to the seaman). Accordingly, the court properly held that the insurance company could not subrogate against Marathon for a risk covered by the policy, the injury to the seaman. As discussed above, the policy which Mid-Valley obtained in full compliance with its obligations under the charter was an employer's liability policy which did not cover the risk which is the subject of the underlying lawsuit, namely, injury to non-crew members such as Paul Dombrowski. Accordingly, the facts as well as the holding in *Dow Chemical Company v. M\V ROBERTA TABOR and M/V SUGARLAND*, 815 F.2d 1037 (5th Cir. 1987) are dispositive.

In *Dow Chemical*, Chotin owned the barge, the M/V Sugarland which it fully chartered to Dow. The charter agreement between Dow and Chotin required Dow to obtain hull insurance

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13. In its brief to the Third Circuit Bean had argued that *Dow Chemical Company* was directly on point (although they misstated the holding in that case as well). Mid-Valley agreed with that assertion as did the Third Circuit.

and protection and indemnity insurance on the barge and to name Chotin as an additional insured with a waiver of subrogation. Dow chose to self-insure which was permitted under the charter. Neither the standard hull insurance nor the P&I insurance that Dow was obligated to obtain would have insured either party for loss of use of the barge. Because Dow had elected to self-insure, Dow was, in effect, Chotin's hull underwriter for any damage to the barges. As Chotin's hull underwriter, Dow also agreed to waive all rights of subrogation against Chotin. Consequently, the court properly held that Dow could not recover from Chotin damages *for a loss covered by the hull policy.*

The *Dow* court came to a different result however when it analyzed Dow's claim against Chotin for the loss of use of the barges:

> In the case sub judice, however, neither the standard hull insurance nor the P&I insurance that Dow was obligated to obtain would have insured Chotin against the loss of use claim asserted by Dow. Hence, Dow was not Chotin's hull underwriter with respect to that claim. Since Dow was not Chotin's underwriter with respect to this claim, Dow was not prevented by the charter party from suing Chotin for loss of use. Hence, we hold that the district court erred in holding that Dow' s suit against Chotin for loss of use constituted a breach of Dow's obligations under the charter parties.

Dow Chemical Company, supra at 815 F.2d 1045.

In the instant matter, injuries suffered by Paul Dombrowski, a non-crew member within the meaning of the master bareboat charter, were not claims or risks covered by the insurance that Mid-

Valley was contractually obligated to obtain. Thus, it is clear that neither Mid-Valley, nor Highlands for that matter, was Bean's underwriter with respect to the claim of Paul Dombrowski. Accordingly, Mid-Valley was not prevented by the charter party from suing Bean for its breach of contract. Simply put, this matter involved no more than a breach of Bean's responsibility to come forward with the insurance which they agreed to provide in the master bareboat charter.

CONCLUSION

The master bareboat charter entered into between Mid-Valley and Bean, two sophisticated commercial entities of equal bargaining powers must be enforced. The *Bisso* line of cases which have been explicitly limited to the towing industry have no application to the dispute before this Court. In fact, the public policy of freedom of contract as announced by this Court as well as appellate courts nationwide requires enforcement of the charter in question. The charter merely facilitated the allocation of the costs of insurance. Such agreements are routinely enforced in the commercial setting and there is no reason for disturbing this long-established commercial practice.

Furthermore, the instant matter does not involve any issues of subrogation. Mid-Valley was never contractually obligated to obtain insurance coverage for injuries suffered by Dombrowski. The dispute here is purely and simply one between Mid-Valley and Bean to enforce obligations fairly bargained for and clearly set forth in the charter. *Dow Chemical Company v. M/V ROBERTA TAYLOR and M/V SUGARLAND,* 815 F.2d 1037 (5th Cir. 1987) is controlling.

For all of the foregoing reasons it is repectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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